October 31, 2006

To the Editor:

Your recent article regarding the Michigan Supreme Court's proposed changes to trial rules, "Enhancing the Jury Experience" failed to tell the whole story about these proposals and the response of the State Bar Representative Assembly. I participated in the Assembly's deliberations concerning these proposals and that body recognized that there were two very sets of rule changes contained within the proposal.

The first set of rule changes genuinely speak how the jury conducts itself and can fairly be called "jury reform" proposals. Some of them were adopted by the Assembly and others rejected. The Assembly overwhelmingly endorsed proposals to give the jury the right to ask questions, take notes, ask for a jury view, and receive a trial notebook of exhibits and instructions. At the same time, the Assembly rejected a proposal to allow the jury to discuss the case before the conclusion of all proofs. Whether accepted or rejected, each of these proposals met a fundamental set of criteria: (1) each was intended to empower and engage the jury; (2) none would require changes in the rules of evidence; (3) none would increase the cost of litigation or frequency of appeal; (4) many were already being successfully employed by some Michigan judges; and (5) each has been well-tested in other states, and endorsed by the ABA.

By contrast, the other rule changes in the Supreme Court proposals do not meet any of these five criteria. These proposals would:

a. allow judges to comment on the weight of the evidence;

b. allow the defendant to present his expert testimony during the prosecutor's or plaintiff's case and provide for "expert discussion panels";

c. mandate that where a party takes testimony by trial deposition that the deposition will not be read to the jury and instead that the parties are to submit a "deposition summary" to be read to the jury;

The Assembly considered each of these proposals and each was voted down unanimously. They did not garner a single vote from the 150 Assembly members who represent every the bar in every county of the State. The Assembly members include prosecutors, criminal defense attorneys, civil plaintiff's attorneys, civil defense attorneys and attorneys whose work does not involve trial practice. In addition to being voted down unanimously, they were not endorsed by any of the four judges and four attorneys on a discussion panel which was convened for the meeting (disclosure: this writer was one of the attorneys on the panel).

Allowing judges to comment on the evidence is plainly an attempt to reduce the authority of the jury, rather than increase it. Each of the four judges on the panel stated that they believed that no matter how carefully they offered such comment, the jury would undoubtedly seek to adopt the judge's conclusions thereby making the judge a "super-juror". Notably, the four judges each said they would choose not to exercise such authority as they did not want to influence the jury. Ironically, this means that the judges most likely to exercise this power would be those who did want to influence the jury.

The proposal to have defense experts testify during the prosecutor's or plaintiff's case is equally ill-informed. First, the prosecutor or the plaintiff bears the burdens of both going forward and of proof, and so are permitted to offer their case first in its entirety. To require them to insert defendant's witnesses in the middle of their case violates this fundamental principle of the adversarial system. Second, the rule will invite gamesmanship in many forms. For example, since experts can only testify as to facts which have been admitted into evidence, the plaintiff or prosecutor could limit the scope of the defense expert's testimony by not introducing certain facts until after the defense expert has testified. The present system insures that when the defense expert testifies all of the other side's evidence has been admitted. Third, the notion of an expert "panel discussion" simply throws out the rules of evidence. Scientific or medical experts are not trained in the rules of evidence and will unquestionably refer to hearsay, non-admitted scientific literature, results in other similar cases, the existence of insurance and so forth. Fourth, the costs will be prohibitive. Adding a second day to each expert's stay at trial, or requiring each to return for a panel discussion will cost each party thousands or tens of thousands of dollars. And if one side elects to spend that money, the other side will have little choice but to follow suit.

The proposal regarding the use of "deposition summaries" would also serve to reduce the role of the jury as fact-finder and create unnecessary costs and appeals. First, this proposed rule would not reduce costs as the deposition would still have to be taken. All that would be changed is that the jury would never see the witness or hear his own words. This ignores the fact that one of the most important roles of the jury is to judge the credibility of the witnesses by their words and presentation. A conclusory report about what the witness said does not allow the jury to see or hear a witness' admission or subtle change of testimony under skillful cross-examination. Second, the rule would increase the disadvantage faced by the party that seeks to present a trial deposition where the other side is able to present witnesses live in the courtroom. Presently, such parties are already disadvantaged by the fact that their witness is seen only on videotape or heard through the reading of a transcript while the other side's witness will sit just a few feet from the jury and look into their eyes. With adoption of this rule, the deposition witness will be removed even further. The jury will not hear from her at all–only a summary of her testimony to which both sides have agreed. This brings us to third and most obvious problem. It is simply unrealistic to think that the two parties will agree on the text of a deposition summary. In the end the summary will have to be drafted by the court requiring the court to study every word of the deposition and resulting in an appeal in virtually every case. What standards will the court follow in summarizing depositions? While there are rules of evidence to guide a judge in

deciding whether a certain question may be asked, there are no rules regarding proper summarizing of a witnesses testimony that is fair to both parties.

The three proposals just discussed cannot properly be called "jury reforms". Instead, they constitute radical changes in the way cases are tried, remove power from the jury, increase the cost of litigation and require changes to, or abandonment of, the rules of evidence. Equally troubling is the fact that such extraordinary changes have been proposed without any testing in other jurisdictions. Some suggest that the proposals were modeled on changes adopted in Indiana. However, the two judges and the two attorneys from Indiana who spoke to the Assembly made clear that these three proposals have never been proposed let alone adopted in Indiana.

The bottom line is that the Supreme Court's proposal is in fact two proposals packaged as one. One proposal suggests changes which have been well-tested, empower the jury and demand little change in trial practice or costs. Whether one favors those changes or not, they can fairly be called a set of "jury reforms". The second is a set of proposals which would dramatically alter fundamental notions of our justice system, make a mockery of the rules of evidence, increase the incidence of appeal and greatly increase the cost of litigation. To call them "jury reforms" is either an error or an intentional effort to mislead.

In his opening statements to the Assembly, Justice Markman indicated that the Court had not made up its mind regarding any of the proposed rules and that critical to their decision making would be the deliberations and recommendations of the Representative Assembly. The Representative Assembly deliberated and voted and has made its views as clear as can be. I trust that the members of the Michigan Supreme Court will recognize the wisdom of the Assembly's recommendations.

Very truly yours,

Douglas B. Shapiro

DBS/wrs